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No. 90-1923

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

SANDRA KEEFER, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether 11 C.F.R. § 114.4(b)(5)(i), a Federal Election Commission regulation which prohibits "wording . . . questions presented . . . [to] favor any position on the issues covered" and "express[ing an] editorial opinion concerning the issues presented" in a corporate-funded, issue-oriented voter guide, has a statutory basis in 2 U.S.C. § 441b, which has been authoritatively interpreted by this Court to not encompass issue advocacy but to prohibit "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."

2. If these regulations found at 11 C.F.R. § 114.4(b)(5)(i) do have a statutory basis in 2 U.S.C. § 441b, whether 2 U.S.C. § 441b unconstitutionally violates first amendment rights of free expression by overbroadly restricting issue advocacy along with election advocacy, and fourteenth amendment rights of due process, by defining too vaguely the line between permissible and impermissible speech.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Maine Right to Life Committee, Inc., the Respondent not named in the style of this case, discloses that it has no parent companies, no subsidiaries, and no affiliates that have issued shares to the public.

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SANDRA KEEFER, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Maine Right to Life, Inc. and Sandra Keefer (known as Sandra Faucher prior to her recent marriage) respectfully ask this Court to deny a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit in *Sandra Faucher, et al. v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991).

REASONS FOR DENYING THE WRIT

In determining whether to grant a petition for a writ of *certiorari*, this Court traditionally assesses the case by three criteria. First, whether there is error in the decision below. Second, whether the case involves a conflict between lower

jurisdictions or with a prior decision of this Court. Third, whether the case is of special importance.

In the case at bar, there is, first, no error below for the Court of Appeals correctly followed the decision of this Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), by declaring a regulation of the FEC — regulating corporate *issue* advocacy — to be beyond the authority of 2 U.S.C. § 441b.

The core of this case may be briefly summarized:

(1) In *MCFL*, this Court dealt with the issue of voter guides paid for by corporate funds, as in the case at bar.

(2) In this context of considering voter guides, the *MCFL* Court authoritatively construed § 441b (a statute prohibiting most corporate expenditures in connection with federal elections) and held that § 441b does not not reach the advocacy of *issues*, which is protected by the first amendment: "We therefore hold that an expenditure must constitute 'express advocacy [of the election or defeat of a clearly identified candidate for federal office]' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249.

(3) Despite *MCFL*'s holding that § 441b does not reach issue advocacy — decided in the context of considering voter guides — the FEC has refused to alter two regulations which limit issue advocacy in voter guides and which rely on § 441b for authority. These regulations require that a voter guide published with corporate funds "not suggest or favor any position on the *issues* covered" and "express[] no editorial opinion concerning the *issues* presented." 11 C.F.R. § 114.4(b)(5)(i) (emphasis added).

The decision below correctly followed *MCFL* and held, under authority of the Administrative Procedure Act, that these regulations exceeded the authority of § 441b and were therefore void.

Second, there is no decisional conflict — either among jurisdictions or with a prior decision of this Court — because the

lower courts have correctly followed the decision of this Court in *MCFL*.

Third, this case has no special importance because this Court has already firmly established that there may be no regulation of corporate issue advocacy under 2 U.S.C. § 441b because of the first amendment of the United States Constitution.

Thus, there being no error, conflict, or special importance in this case, the Petition for a Writ of *Certiorari* herein ought to be denied.

I. THERE WAS NO ERROR IN THE DECISION BELOW, WHICH CORRECTLY HELD THAT § 441B DOES NOT GOVERN ISSUE ADVOCACY SO THAT REGULATIONS GOVERNING ISSUE ADVOCACY ARE BEYOND THE SCOPE OF THAT STATUTE.

The FEC devotes the major portion of its Petition to discussing the legislative history of § 441b. In sum, the FEC claims that this history shows "that Congress did not intend to limit the application of section 441b to expenditures for 'express advocacy.'" Petition at 12. The FEC further argues that this interpretation at which it has arrived is entitled to substantial deference and that the standard of review is whether the regulation is "'a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent.'" Petition at 17 (citation omitted).

However, the FEC's line of argument ignores two key points. First, this Court has handed down a long line of cases which set forth the strong constitutional protection for political speech and especially for vigorous issue advocacy. Second, this Court has already authoritatively interpreted § 441b — taking into account its legislative history and the requirements of the Constitution — to prohibit only express advocacy of the election or defeat of a federal candidate and not to prohibit issue-oriented speech.

Therefore, no deference is to be afforded to any FEC inter-

pretation of § 441b which is at odds with the interpretation already authoritatively made by this Court. Moreover, any regulation must be a plausible construction of § 441b *as interpreted by this Court*. The regulation at issue herein exceeds the authority of the FEC under § 441b by expressly forbidding activity which this Court has declared to be expressly protected by the Constitution and therefore not prohibited by 2 U.S.C. § 441b, namely, issue advocacy.

A. *This Court Has Recognized Strong Constitutional Protection for Corporate, Issue-Oriented Speech and Has Only Permitted Restrictions of Corporate Speech Where It Expressly Advocates the Election or Defeat of a Clearly Identified Federal Candidate.*

This Court has long and carefully watched over efforts by Congress to regulate corporate political speech to be certain that the guarantees of the first amendment are not denied to corporations. This is so because restrictions on corporate political speech "limit political expression 'at the core of our electoral process and of First Amendment freedoms.'" *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

Not only has this Court recognized strong constitutional protection for corporate political speech in general — including the right to urge the election or defeat of a candidate — it has recognized as inviolable the right of corporations to engage in issue-oriented speech. Thus, government may regulate corporate speech urging the election or defeat of a clearly identified candidate only because this Court has recognized sufficient compelling state interests to justify narrowly drawn laws in this area. However, government may not regulate issue-oriented speech. This is clear from a number of Supreme Court decisions, including *United States v. Congress of Industrial Organizations (C.I.O.)*, 335 U.S. 106, 121 (1948) ("If § 313 [barring corporations from making 'any expenditure in connection with a federal election'] were construed to prohibit the publica-

tion, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."), and *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

Buckley dealt, inter alia, with a provision which limited "'any expenditure . . . relative to a clearly identified candidate.'" *Buckley*, 424 U.S. at 41 (quoting 2 U.S.C. § 608(e)(1)). The provision placed a limit on the amount of an independent expenditure on behalf of a candidate. However, this provision was considered to be unconstitutionally vague. *Buckley*, 424 U.S. at 41. Therefore, this Court construed it with another provision of the same statute to require "'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate." *Id.* at 42. The *Buckley* Court noted that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42. Thus, this Court continued, a speaker might never be fully certain that "words intended and designed to fall short of invitation" would be so construed by a listener. *Id.* at 43. As a result, "[s]uch a distinction offers no security for free discussion." *Id.*

Because of the problem described, the *Buckley* Court settled on the "express advocacy" test as marking the demarcation line between the permitted and the forbidden. This test is constitutionally mandated because only a statute prohibiting the express advocacy of a clearly identified federal candidate has a sufficiently bright line of distinction to make it constitu-

tionally defensible. This Court, in *Buckley*, explained the problem with a quotation from *Thomas v. Collins*, 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some one as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43. Thus, this Court, in *Buckley*, said that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) [placing a ceiling on independent expenditures] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.*

Without such a clear line of demarcation, then, a speaker is forced to "hedge and trim" comments made on issues of public importance for fear he will be charged with forbidden electioneering. This is too heavy a burden on first amendment rights to be constitutionally permitted.

The *Buckley* Court concluded that "[t]he constitutional deficiencies" of such unclear statutory language could only be cured by reading the statute "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for a public office." *Id.* at 44. This Court added that "[t]his construction would restrict the application of § 608(e)(1) to communications containing

express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

The *Buckley* Court proceeded to determine whether the statute, "even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression." *Id.* at 44. This Court determined that the government could not advance an interest in support of the statute sufficient to "satisfy the exacting scrutiny applicable to limitations on core First Amendment right of political expression." *Id.* at 44-45. The *Buckley* Court expanded on the subject of the first amendment's powerful protection of political speech:

> [T]he First Amendment right to "'speak one's mind . . . on all public institutions'" includes the right to engage in "'vigorous advocacy' no less than 'abstract discussion.'" Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

Id. at 48 (citations omitted) (ellipsis in original). The *Buckley* Court also quoted approvingly the comments of the United States Court of Appeals for the District of Columbia, which it affirmed:

> "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

Id. at 42 n.50 (quoting 171 U.S. App. D.C. 172, 226, 519 F.2d 821, 875 (D.C. Cir. 1975)).

From this line of cases, it is clear that the Constitution affords strong protection to corporate speech on political matters — even speech advocating the election or defeat of a clearly

identified candidate. The first amendment guarantees are so strong that government may only regulate such speech if it has a compelling interest, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), and the regulation "must employ means 'closely drawn to avoid unnecessary abridgment.'" *Id.* at 786 (quoting *Buckley*, 424 U.S. at 25). If the Constitution protects even express advocacy, then a *fortiori* it protects issue advocacy. From the above history, it is clear that this Court has never recognized as constitutional any infringement on the right of corporations to engage in vigorous advocacy concerning issues of public concern.

In 1986, this Court again considered the constitutional protection afforded corporate political speech, and issue advocacy in particular, in the case of *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238. In *MCFL*, this Court considered the contention of Massachusetts Citizens for Life, Inc. "that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," relying on *Buckley v. Valeo*. *MCFL*, 479 U.S. at 428. The focus of the contention was voter guides.

Noting that corporate independent expenditures "constitute expression at the core of our electoral process and of the First Amendment freedoms," *id.* at 251 (quotation marks and citations omitted), the strict scrutiny to which burdens on first amendment rights are subjected, *id.* at 257, and the compelling state interest which government must show to justify such a burden, *id.* at 252, this Court held that § 441b was governed by the express advocacy test: "We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249.

Thus, in *MCFL*, this Court extended the *Buckley* rationale to restrictions on independent expenditures in the context of considering voter guides. *Id.* at 249. This Court said that if a ceiling on independent expenditures, at issue in *Buckley*, had to be construed to apply only to express advocacy of the elec-

tion or defeat of a clearly identified candidate (in order to eliminate the constitutional deficiencies described in *Buckley*), "this rationale requires a similar construction of the more intrusive provision [at issue in *MCFL*] that directly regulates independent spending." *MCFL*, 479 U.S. at 249.

In sum, this Court has never recognized a compelling interest which would justify regulation of issue advocacy. Rather, it has held that the right to vigorously advocate issues is sacrosanct. Therefore, corporate issue advocacy must be given a sufficiently wide berth to guarantee that corporations will feel free to exercise their constitutional right of free speech. *Buckley*, 424 U.S. at 78. Moreover, where government regulates near to this sacrosanct area, it must employ the bright line of demarcation between the permissible and impermissible set forth in *Buckley* and *MCFL*.

This bright line is marked by two key points which must be observed before speech may be restricted under 2 U.S.C. § 441b. First, express advocacy must indeed be *express*. *Implied* advocacy may not be regulated. Second, the advocacy must be *election oriented* and *not issue oriented* to be the type of advocacy contemplated by the express advocacy test. Even where there is election advocacy, it must be of a *clearly identified candidate*. Before advocacy may be regulated under 2 U.S.C. § 441b or any regulations thereunder, both of these conditions must be met. The advocacy must be truly *express* and it *must urge the election or defeat of a clearly identified candidate*. As shall be seen, the FEC regulation herein transgresses on both these points, seeking to regulate *implied* advocacy of *issues*, rather than express advocacy of the election or defeat of a clearly identified candidate for federal office.

B. *2 U.S.C. § 441b Has Been Authoritatively Interpreted by This Court to Prohibit Only Corporate Expenditures Expressly Advocating the Election or Defeat of a Clearly Identified Federal Candidate.*

1. This Court Has Determined That § 441b Applies Only to Express Advocacy.

In its discussion of the legislative history of § 441b, the FEC seeks to convince this Court that the statute should be construed to permit regulation of corporate issue advocacy. However, this Court has already authoritatively interpreted § 441b to prohibit only express advocacy of the election or defeat of a clearly identified candidate for federal office.

The FEC asserts that "no court may 'judicially rewrit[e]' a statute to avoid constitutional questions." Petition at 11 (citation omitted). However, this Court does have the power to authoritatively construe federal statutes. *See, e.g., Chevron, U.S.A. v. Natural Resources Defense*, 467 U.S. 837, 843 (1984) ("The judiciary is the final authority on issues of statutory construction . . . ."). It has long been this Court's practice to do so in cases, such as *Buckley* and *MCFL*, where severe questions arise as to the constitutionality of a federal statute. Justice Holmes, in his famous dissent in *Ashwander v. TVA*, 297 U.S. 288, 348 (1936), summarized this principle of avoiding constitutional questions by statutory construction and cited cases where it had been applied.

In construing § 441b, this Court has construed it not to prohibit issue advocacy. This Court construed § 441b as governing only the express advocacy of a clearly identified candidate for federal office. This Court has already taken into account the legislative history of § 441b, its plain language, its context, and the requirements of the first amendment in making its authoritative construction in *MCFL*.

2. This Interpretation Is Not Contrary to Congressional Intent.

The FEC insists that this Court's construction of § 441b is erroneous because "[t]he language, history, structure, and purposes of 2 U.S.C. § 441b clearly establish that Congress intended it to regulate some expenditures by corporations that do not involve 'express advocacy.'" Petition at 11. However, the FEC makes much of little in the legislative history and ignores the clear intention of Congress to govern only express advocacy in the same history.

By its multiple citations, the FEC makes the legislative history on voter guides appear more expansive than it really is. Petition at 12-15. In reality, actual discussion of voter guides is very brief. Moreover, the discussion is inconclusive and capable of multiple interpretations. Senator Ball, declared that he "did not think there is a single thing in the bill which prohibits any union or corporation . . . from publishing any public official's voting record" because "that is not a campaign for or against a candidate." Senator Taft intimated that, in his mind, a voter guide which "was merely a bare statement of actual facts and simply direct quotations . . . and was not colored in any way" might be lawful under the statute. However, he did not expand on the meaning of the term "colored" — whether he meant colored by partisan, express advocacy of the election or defeat of a clearly identified federal candidate or colored by issue advocacy. Senator Pepper responded to Sen. Taft that "[t]he language is 'in connection with.' The provision does not contain any statement as to whether the statement is colored or not." Senator Taft concluded the discussion by noting that the question was "not very practical . . . because no one would do just that. Either it is an argument for him or against him, or it is not." 93 Cong. Rec. 6447 (1947). Thus, there was disagreement among the Senators on how the statute would apply to voter guides. From these statements alone, no conclusive legislative intent may be discerned.

However, by examining the context in which these statements occurred, one will discover that this discussion of "colored" voter guides occured amid a strong emphasis on the advocacy of parties or candidates, rather than issues. For example, after the opening questions about voter guides, the discussion immediately shifted to union- or corporate-sponsored news commentators who might color the news in a color favorable to their organization. Mr. Taft declared, "If the General Motors Corp. had a man speaking on the radio every week to advocate the election of a Republican or a Democratic Presidential candidate . . . it would be punished under the law." *Id.* This context makes clear that the "coloring" which was of concern was not issue advocacy, but, rather, advocacy of the election or defeat of a clearly identified candidate from one party or the other on the basis of party affiliation or loyalty to the candidate and not on the basis of ideological orientation with regard to issues being advocated.

This context of expressly advocating the election or defeat of a clearly identified candidate (or party) rather than advocating an issue for which a candidate happens to stand is also evident in the other section of the Congressional Record cited by the FEC. Petition at 13. In describing his amendment, chief house sponsor Rep. Hansen declared that "[t]he effect of this language is to . . . prohibit the use of . . . corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election." 117 Cong. Rec. 43,379 (1971). Further examination of Rep. Hansen's remarks demonstrates that his amendment was targeted at "partisan electioneering" or "partisan politicking," with "partisan" used in the sense of supporting one candidate or party, and not in the sense of supporting an issue with which certain candidates happen to be aligned. *Id.* at 43,379-84. Rep. Hansen concluded his long monologue by asserting that his amendment prohibited corporate expenditures "to reach the general public in support of, or in opposition to, Federal candidates . . . ." *Id.* at 43,381.

Reading these quotes, one must be struck by the close parallel in language with what this Court has held to be the lawful scope of § 441b, i.e., limiting the express advocacy of the election or defeat of a clearly identified candidate for federal office but not limiting issue advocacy in any way. *See also id.* at 43,383 (remarks of Rep. Hansen) (amendment prohibits "active electioneering on behalf of particular Federal candidates"); *id.* at 43,384 (remarks of Rep. Hansen) ("prohibit active electioneering" and "active public partisan politicking").

The FEC attempts to bolster its legislative history conclusion with other arguments: (1) that the language Congress used in § 441b is extremely broad as compared with other more narrow language used by Congress (Petition at 12, 15), and (2) that this Court's interpretation of § 441b would make provisions therein regulating voter registration and get-out-the-vote campaigns "superfluous" (Petition at 14-15).

While the language is broad, just how broad it is must be decided in light of the intent of Congress to enact constitutionally permissible legislation (thereby not attempting to restrict issue advocacy) and in light of the above legislative history (which indicates an intention not to regulate issue advocacy). It is well established that congressional action must be interpreted in the light of the contemporary legal context, and the assumption must be made that Congress was aware of constitutional requirements and intent on abiding by them. *NRLB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). At least by 1976, when Congress retained the provisions of § 441b while moving it from the criminal code to Title 2 and altering other provisions of the Act, Petition at 15, Congress must be presumed to have known that § 441b governed only express advocacy of the election or defeat of a clearly identified candidate and not issue advocacy which may be associated with some candidate. Congress would have been aware of the constitutional requirements in the area of election regulations from this

Court's decisions in, inter alia, *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948), and *Buckley*, 424 U.S. 1 (1976). Therefore, a mere assertion about the broadness of the language is meaningless. Congress would not have intended its statute to be broader than the Constitution allowed.

Nor is the fact that Congress narrowed other provisions after *Buckley* and did not narrow § 441b meaningful. Petition at 15. *Buckley* directly addressed the provisions which were changed, but it did not directly address § 441b or the FEC regulations at issue in this case. The problem, of course, is with the regulations — which go beyond the congressional intent and the permissible constitutional scope of § 441b — and not with § 441b itself. Congress doubtless saw no problem with § 441b itself — especially as it had been authoritatively construed by this Court to avoid constitutional difficulty — and changing the regulations is the duty of the FEC not Congress. There is no need to alter § 441b to alter the regulations and bring them into conformity with this Court's construction of § 441b.

As to the claimed superfluity of § 441b(b)(2)(B) which provides for "nonpartisan" registration and get-out-the-vote drives, a simple examination of the statute resolves the problem perceived by the FEC. The FEC argues that "by definition" these "nonpartisan" activities "could never involve express advocacy of a candidate's election or defeat." Petition at 15. The FEC argument is that these activities would already be permitted because they do not involve express advocacy of the election or defeat of a clearly identified federal candidate. However, this argument ignores the plain language of the statute. Section 441b forbids corporate (and union) contributions or expenditures "*in connection with*" any federal election. 2 U.S.C. § 441b(a) (emphasis added). Registering people to vote and taking people to the polls are quintessential political activities done *in connection with* elections. Registration and voter mobilization profoundly influence elections. But for

the exceptions allowed for them in § 441b, that statute would prohibit corporate or union expenditures for such activities. Just as voter registration and mobilization affect elections, so does corporate or union speech about candidates and issues raised in elections. The difference between the activities is that regulation of voter registration and mobilization does not raise first amendment concerns, while regulating union and corporate speech raises serious free speech issues. Thus, Congress may prohibit all corporate financial activity in connection with an election but decide to permit "nonpartisan" voter registration and mobilization without any first amendment concerns. However, Congress would have to intend to violate the first amendment to intend to regulate corporate or union speech about issues raised in in general public debate or in an election. This Court construed § 441b in a manner which assumed congressional compliance with constitutional mandates.

3. This Interpretation Was Not Obiter Dictum.

In an effort to avoid the authoritative construction of § 441b by this Court, the FEC calls the decision of this Court, construing § 441b to be governed by the express advocacy test, a mere dictum. Petition at 15-16. This is not supportable.

In *MCFL*, the First Circuit avoided the issue of whether § 441b must be interpreted to bar only express advocacy of the election or defeat of a clearly identified federal candidate (as *Buckley* seemed to require). That court stated:

> We do not decide whether the section 441b definition of expenditure includes an 'express advocacy' requirement, because we conclude, contrary to the district court, that the MCFL publication would fit within the definition of expenditure, even if an express advocacy requirement were incorporated into the definition.

MCFL, 769 F.2d 13, 20 (1985).

Although this Court, in *MCFL*, could have similarly avoided the issue — both because it found that there was express advocacy and because it held that MCFL-type organizations

could not be restricted from engaging in express advocacy — it did not do so. Rather, this Court held that § 441b was governed by the express advocacy test in the following words:

> We therefore ***hold*** that an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b.

MCFL, 479 U.S. at 249 (emphasis added).

By contrast, this Court did not decide the issue of whether MCFL's newsletter fell within the exception to the corporate independent expenditure prohibition for periodical publications because MCFL's newsletter was not a regular edition of the newsletter. *Id.* at 250. Had this Court wished to avoid a holding that § 441b was governed by the express advocacy test, it had before it its own example with regard to the newspaper exception. That this Court expressly decided the issue was no mistake.

Rather, this Court felt it necessary to decide the issue of whether § 441 encompasses only express advocacy because of the analysis which it constructed — an analysis steadfastly resisted by the FEC. The test adopted by this Court is a sequential one. First, a court should determine whether or not a particular independent expenditure constitutes express advocacy. Second, if it does, then the court should determine whether the corporation making the expenditure is an MCFL-type organization and thus may engage in express advocacy. This is precisely the way the test was applied in *MCFL*. *Id.* at 248-65.[1]

Finally, it seems appropriate that when this Court expressly "holds" something, using that precise term, that decision

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[1] The United States District Court for the District of Columbia has held that the express advocacy test governs § 441b because of *MCFL*, and did not treat this Court's holding as a mere dictum. *Federal Election Commission v. National Organization of Women(NOW)*, 713 F. Supp. 428, 433 (D.D.C. 1989), *appeal pending* (D.C. Cir. No. 89-5230).

should be followed by a federal agency. It seems presumptuous of the FEC to claim that this Court, which has the last word on what it does and does not hold, has not held something when it expressly said that it did so.

However, this seems indicative of a mindset at the FEC. By contrast, Congress followed this Court's decision in Buckley and revised many of its statutes to conform with this Court's decrees in Buckley, even though Buckley's creation of the express advocacy test could have been declared mere obiter dictum in the same manner in which the FEC is treating this Court's pronouncement in *MCFL*.[2] Congress did not go looking for ways to avoid what this Court had decreed to be constitutionally necessary. However, the FEC continues to resist the requirement that the express advocacy test be incorporated in its regulations even after this Court's decision in *MCFL*.

4. Therefore, No Deference Should Be Afforded the FEC's Interpretation of § 441b.

The FEC's urgent plea for deference to its interpretation of 2 U.S.C. § 441b is misplaced. No deference can be afforded a

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[2] In *Buckley*, a predecessor statute (§ 608(e)(1) — which placed a ceiling on independent expenditures) to § 441b was construed by this Court "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. However, this Court proceeded to hold that the statute — even as narrowed to avoid constitutional difficulties — was not justified by a compelling state interest. *Id.* at 44-51. Given the fact that the statute was unconstitutional under any construction which the Court could give it, the construction of the statute to reach only express advocacy was unnecessary to the decision, i.e., it was obiter dictum. However, no one but the FEC seems to believe that pronouncements of this Court in such settings may be ignored when they are not absolutely essential to a decision. Clearly, this Court sometimes gives guidance through its judicial commentary which may be dictum. However, where this Court has consistently over a long time asserted that vigorous issue advocacy may not be impinged upon and that the express advocacy test is essential to prevent such impingement, it seems evident that it means what it says and is not merely making comments by the way without adequate consideration.

statutory interpretation by a federal agency which flies in the face of an authoritative construction of the same statute by this Court.

C. *Because the FEC Regulations at Issue Herein Are Beyond the Authority of § 441b, They Are Void Under the Administrative Procedure Act.*

From the preceding material, it is clear that § 441b has been authoritatively construed by this Court to reach only express advocacy. Therefore, any regulation promulgated under the authority of 2 U.S.C. § 441b has authority only in so far as it regulates the express advocacy of the election or defeat of a clearly identified candidate. Conversely, any regulation which restricts issue advocacy in any way is ultra vires. The regulation of the FEC, at 11 C.F.R. § 114.4(b)(5)(i), goes far beyond regulation of express advocacy and expressly prohibits issue advocacy. The regulation was properly declared by the decision below to be beyond the power of the FEC under 2 U.S.C. § 441b and therefore void.

The regulation at 11 C.F.R. § 114.4(b)(5)(i) crosses the line created by this Court in two ways. First, it regulates *implied* rather than *express* advocacy. Second, it regulates advocacy of issues rather than of the *election or defeat* of clearly identified candidates. This is apparent in the provisions of the regulation, Petition at 35a-36a, which give factors employed by the FEC to determine whether a voter guide is "nonpartisan" and therefore permitted.

Preliminarily, it should be noted that the term "nonpartisan" itself is unobjectionable if properly defined. If "nonpartisan" were defined by the FEC in a limited manner to mean only that a voter guide may not expressly advocate the election or defeat of clearly identified candidate, the regulation would be authorized by 2 U.S.C. § 441b. However, in common use, a "partisan" is "a firm adherent to a party, faction, *cause* or person." *Webster's Ninth New Collegiate Dictionary* (1985) (emphasis added). Under this common usage, being nonpartisan would

require not only no promotion of candidates or parties, but also no espousal of causes, i.e., issues. Under this Court's authoritative interpretation of 2 U.S.C. § 441b, issue advocacy may not be restricted, so such a definition would be ultra vires. As set forth in the following discussion, the FEC has chosen a similarly unauthorized (and unconstitutional) definition of "nonpartisan."

The FEC's definition of "nonpartisan" is set forth in six factors, found at 11 C.F.R. § 114.4(b)(5)(i). Of these factors, two are clearly objectionable. These state:

> (C) The wording of the questions presented does not suggest or favor any position on the issues covered;
>
> (D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party.

11 C.F.R. § 114.4(b)(5)(i).

The first of these quoted factors clearly forbids a corporation from advocating one issue over another. It says that questions may not be worded to "suggest or favor any position on the issues covered." 11 C.F.R. § 114.4(b)(5)(i)(C). This is beyond the authority of 2 U.S.C. § 441b, which has been construed to protect *issue* advocacy. Nor would it be *express* advocacy of the election or defeat of a clearly identified candidate for a corporation to indicate its position on any issue discussed. To the extent that stating a corporation's position on an issue advocates a candidate's election or defeat rather than an issue, it would yet be only *implied* advocacy. Implied advocacy is not prohibited by 2 U.S.C. § 441b, only express advocacy.

The second of these quoted factors forbids the expression of any "editorial opinion concerning the issues presented." 11 C.F.R. § 114.4(b)(5)(i)(D). This, too, is a restriction on issue advocacy, which advocacy is constitutionally protected and outside the scope of what 2 U.S.C. § 441b prohibits.

The facts of the case at bar illustrate well the burden of this

unconstitutional and ultra vires restriction. Maine Right to Life Committee, Inc. (MRLC) publishes its voter guides in its regular newsletter. This is common among public interest corporations such as MRLC, due to financial necessity.[3] They have limited resources and cannot afford to regularly issue extra publications and make extra mailings, so they publish a voter guide within their newsletters. The FEC regulation forbids MRLC from making any editorial commentary on the issues it supports in the voter guide edition of its regular newsletter. Indeed, carried to its logical extreme, this regulation could be construed to prohibit organizations such as MRLC from publishing voter guides because its very name, Maine Right to Life Committee, Inc., suggests an opinion on the issues in its voter guide. This is a heavy burden on free speech which is not authorized by 2 U.S.C. § 441b.

The FEC argues that even if the "dictum" *of MCFL* were to be followed, voter guides are sufficiently unique to justify a regulation restricting issue advocacy. Petition at 17-22. However, *MCFL* was decided precisely in the context of considering a voter guide. Thus, this is not a case of first impression. To now hold that the express advocacy test does not apply to voter guides, this Court would have to overrule *MCFL*.

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[3] Among public interest corporations such as MRLC, political action committee (PAC) funds are also commonly limited, even more so than general treasury funds. MRLC is supported by the grass-roots contributions of common citizens; only an insignificant portion of MRLC's general treasury funds are received from other corporations. Petition at 14a. In order for such public interest corporations to exercise their constitutional right to express opinions on both whom should be elected (a PAC activity) and what issues should be supported (a corporate activity), most organizations must spend PAC funds only on matters strictly pertaining to elections of candidates and use other moneys for issue advocacy. As a result, the corporation's free speech is limited if it must spend PAC funds on issue advocacy, which this Court has determined may be funded by general treasury funds. Therefore, it is not enough for the FEC to simply say that MRLC can publish its voter guide with funds of its PAC. Petition at 21. MRLC may not be forced to pay for constitutionally-protected issue advocacy out of its limited PAC funds.

The FEC claims that its voter guide regulation "comports with th[e *Buckley*] approach," i.e., the express advocacy test. Petition at 19. The purpose of the *Buckley* express advocacy test, according to the FEC, is "to exclude from the provisions' coverage communications devoted to issues that are closely associated with particular politicians who are candidates, since discussion of such issues often includes references to those candidates." *Id.*

The FEC then claims that its regulation follows *Buckley* "by narrowly defining a particular type of expenditure that is unambiguously election related." Petition at 19. The FEC continues, "[I]ssues are presented in such a guide as a basis for choosing among the candidates, not to promote a position on the issues themselves." Petition at 19-20. The FEC fails to understand that issue advocacy is not merely "to promote a position on the issues" but to promote the ascendency of an issue in the marketplace of ideas. This requires that candidates be identified who support those issues. This is best done in the context of a voter guide. However, in the process of identifying which candidates support which issues, a corporation ought not to be to be restricted from simultaneously expressing an opinion on the issues. Both activities are motivated by constitutionally-protected advocacy of issues. This is distinct from promoting or opposing a candidate or a party out of loyalty or opposition to the candidate or the party.

The distinction which the FEC misses was plainly made in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), wherein the 9th Circuit noted that just because a corporation strongly advocates an issue at election time, which is identified favorably or negatively with certain candidates, does not mean that this advocacy is forbidden electioneering. More to the point, a corporate voter guide which is clearly partisan as to an issue is not express advocacy of the election or defeat of a clearly identified candidate. This is made clear in *Furgatch*, which found that an ad discussing the demerits of then-President Carter

> was not issue-oriented speech of the sort that the Supreme Court was careful to distinguish in *Buckley*, and the Second Circuit found to be excluded from the coverage of the Act in *Central Long Island Tax Reform*. The ad directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. It is the type of advertising that the Act was intended to cover.

Id. at 865 (emphasis added).

By contrast, most voter guides are issue oriented. They address a narrow range of issues of special interest to the corporation. What is promoted in such voter guides is clearly these issues, not particular candidates. That it may be clear that the corporation favors candidates which agree with its positions and does not favor candidates which disagree with its positions is a direct result of the advocacy of the issues and not any predisposition — on some non-issue-related basis — toward any candidate. Thus, even partisan voter guides are protected speech, as long as they do not expressly advocate — in the real and strict meaning of that term as set forth in *MCFL* and *Buckley* the election or defeat of a clearly identified federal candidate.

It was precisely because issue advocacy might be hard to distinguish from electioneering that the express advocacy test was created. This Court in *Buckley* relied on this rationale when it created the express advocacy test:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

The FEC's conception is that all corporate speech which may in any way influence an election is forbidden unless it is specially permitted by statute or regulation. This Court has the opposite conception, namely, that all corporate speech is permitted unless it may be constitutionally forbidden. This is because corporate political speech — even speech expressly urging the election or defeat of a clearly identified candidate — is constitutionally protected under the first amendment and may only be abridged by a narrowly tailored restriction which is supported by a compelling interest. *Buckley*, 424 U.S. at 48. Within the sphere of protected speech, this Court has recognized only one type of corporate political speech for which there is a compelling state interest sufficient to justify a restriction on a corporation's free speech — expressly advocating the election or defeat of a clearly identified federal candidate.

The FEC believes that the motivation of the corporate speaker may be examined and form the basis for restricting corporate speech on issues, i.e., if the motive for the voter guide is really to affect federal elections and this particular voter guide is particularly influential in doing so then it may be restricted. But motivation is irrelevant according to the holding of this Court in *MCFL* and elsewhere, for the focus must be on what has actually been said. The approach of the FEC — that one may search for motive in regulating campaign activities — would be impossible to cabin. For example, suppose the President engages in July 4th activities or in a parade to honors troops engaged in Dessert Storm with the motivation of winning the coming election. Are his parading activities and expenses governed by the federal election laws? Of course, they are not. The FEC's approach to governing corporate issue advocacy is to say that if the advocacy is relatively ineffective it need not be restricted, but if the issue advocacy is vigorous and done in the most effective manner possible it may be restricted by the FEC.

Once the proper foundation is laid, it becomes evident that no regulation limiting issue advocacy can stand. This Court has

taken special pains to protect issue advocacy in the thick of political debate and has created the express advocacy test as the line of demarcation to separate election advocacy from issue advocacy when the lines become blurry. The FEC has made every effort to breach the line created by this Court and to eliminate issue advocacy where it may influence an election.

In sum, the FEC has not only failed to give substantial berth to constitutionally-protected corporate free expression, it has actually prohibited corporate issue advocacy by requiring that voter guides published by corporations be "nonpartisan" and defining "partisan" to include issue advocacy. Because this Court has authoritatively interpreted § 441b as not prohibiting issue advocacy — to avoid the obvious violation of first amendment guaranteed free expression — the FEC regulations at issue herein are without statutory authority. Therefore, the district court properly declared them void under the Administrative Procedure Act.

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT OR OTHER COURTS, WHICH HAVE ALL HELD THAT GOVERNMENT REGULATION OF ISSUE ADVOCACY IS CONSTITUTIONALLY PROHIBITED.

Just as there is no conflict between the decision below and the decision of this Court in *MCFL*, there is no conflict between the decision below and decisions of other jurisdictions.[4]

The United States Court of Appeals for the Ninth Circuit followed this Court's express advocacy test in *Federal Election*

[4] The FEC insists that the following two cases are irrelevant to the debate because "both of [them] construed statutory provisions that Congress did not limit [in 1976 after *Buckley*] to expenditures for express advocacy." Petition at 15 n.8. This is merely a return to the FEC argument that Congress intended § 441b to govern issue advocacy because it did not modify § 441b when it modified the provisions at issues in those cases. This argument has already been dealt with in this Brief. These cases are on point in demonstrating how lower courts are consistently following and applying this Court's express advocacy test.

Commission v. Furgatch. 807 F.2d 857 (9th Cir. 1987), cert.denied, 484 U.S. 850 (1987), noting that this "Court was particularly insistent that a clear distinction be made between 'issue discussion,' which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act." *Id.* 860 (citations omitted).

Likewise, the Second Circuit, in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee (CLITRIM)*, 616 F.2d 45 (2d Cir. 1980) (en banc) (per curiam), followed the express advocacy test of *Buckley* in construing two statutes.

In following these cases, the decision below has created no split in the jurisdictions. Rather, all agree with this Court that government may not limit issue advocacy by corporations.

III. This Case Has No Special Significance Making It Worthy of a Writ of *Certiorari*.

Because the decision below followed well-established law declared by this Court, there is no special significance to this case making it worthy of a writ of *certiorari*. There is no novel question of law. Indeed, *MCFL* reaffirmed the "express advocacy" test in the very context of regulations on voter guides — which the FEC now wants to declare as unique. The FEC has simply refused to be governed by the plain and simple "express advocacy" test declared by this Court and other courts in a series of cases over an extended period of time. What the FEC needs to do now is to comply with the dictates of this Court by promulgating new regulations in light of this Court's decision in *MCFL*.

IV. If the FEC Regulations Are Not Beyond the Authority of 2 U.S.C. § 441b, Then § 441b Violates the Constitution by Overbroadly and Vaguely Restricting Issue Advocacy Along With Election Advocacy.

Respondents have relied on this Court's construction of

§ 441b, in *MCFL*, which declared that § 441b does not prohibit issue advocacy in any fashion. This Court so construed § 441b to avoid severe constitutional questions of vagueness and overbreadth. This Court's construction of § 441b served as the basis of the decisions below. If, however, this Court should now decide to follow the FEC's urging and alter its interpretation of § 441b so that it governs issue advocacy, then those severe constitutional questions must be addressed. Respondents are entitled to defend their favorable decision below on any basis. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Moreover, the express advocacy test was built by this Court on the foundation of avoiding constitutional claims by statutory construction. If this Court were to now decide to alter that approach, then the constitutionality of § 441b under the overbreadth doctrine of the first amendment and the vagueness doctrine of the fourteenth amendment would necessarily need to be addressed in this case. This may be avoided by following the statutory construction of § 441b announced by this Court in *MCFL*, making void the regulations of the FEC which forbid a corporation to advocate issues in a voter guide.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

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